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Sarah Rose Silverhardt, Esq.

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BREAKING THE SILENCE WITH A PERMANENT MARK: PREVENTING AND PUNISHING SERIAL RAPISTS ON COLLEGE CAMPUSES

BY: SARAH ROSE SILVERHARDT, ESQ.*

INTRODUCTION

“Somebody’s gotta know where she is. Because it’s been a week and we can’t find her.”¹ Unlike your Sunday marathon of Law & Order: Special Victims Unit, this heinous crime was real. Her name was Hannah Graham. She was a straight A student from Northern Virginia who was musically gifted with a dry sense of humor.² During the early hours of September 13, 2014, the sophomore at the University of Virginia went missing from the downtown area of Charlottesville, Virginia, after a Friday night of drinking and socializing with her friends.³ She was last seen alive on surveillance cameras on Friday night near a restaurant in the Downtown Mall area with a Charlottesville resident later identified as Jesse Matthew.⁴ Only minutes before she vanished, she had texted her friends saying that she was lost and looking for a party.⁵ Thirty-five days later, the remains of her body were found.⁶

*Assistant District Attorney at the Bronx County District Attorney’s Office, Graduate of St. John’s University School of Law, Class of 2017; B.A., Psychology, University of Wisconsin-Madison, May 2013. My thanks are dedicated to two special women, Professor Elaine Chiu and Rosemary LaSala, whose constant encouragement, passion and constructive feedback pushed me to my greatest potential for this piece. And to my family, thank you for your support and for taking this issue to heart with me.

¹ Hannah Graham: Deadly Connections [Part I], 48 HOURS, CBS NEWS (September 2015), <http://www.cbsnews.com/videos/hannah-graham-deadly-connections-part-1-2/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

There was also Morgan Harrington.⁷ During the fall of 2009, this Virginia Tech University student was last seen after she left a Metallica concert and could not return back into the stadium.⁸ Her purse was found in the stadium parking lot, but there was no trace of Morgan.⁹ Her parents suspected she was trying to hail a taxi home when things took a turn for the worse.¹⁰ After five months of searching, her body was found on a rural farm.¹¹ Five years later in 2014, Hannah's remains were found only five miles from the location of Morgan's body.¹²

Coincidence? Definitely not. Forensic evidence affirmed that the same perpetrator had committed the murders of Hannah and Morgan.¹³ Moreover, the perpetrator's DNA came up as a match in the system to yet a third tragedy: an unsolved 2005 sexual assault and attempted murder case in Fairfax, Virginia.¹⁴ DNA evidence connected Jesse L. Matthew to the three separate cases: Hannah Graham, Morgan Harrington, and the anonymous 2005 rape victim.¹⁵

Officials soon discovered that Matthew's crimes dated back even earlier. In 2002, Jesse Matthew attended and played football for Liberty University in Virginia, where he was kicked off the team after allegedly sexually assaulting another student.¹⁶ No criminal charges were filed and it is believed that he was suspended before leaving the university.¹⁷ After transferring to Christopher

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* The 2005 victim remains anonymous. She was rescued by a bystander who intervened during the rape and scared off the perpetrator. *Id.* She was transported to the hospital and had a rape kit completed. *Id.* The rape kit contained DNA evidence that was put into the Combined DNA Index System (CODIS) database. *Id.*

¹⁵ *Id.*

¹⁶ Hannah Graham: Stalked By Evil [Part II], 48 HOURS, CBS NEWS (September 2015) <http://www.cbsnews.com/videos/hannah-graham-deadly-connections-part-1-2/>; see Jake New, *States requiring colleges to note sexual assault responsibility on student transcripts*, INSIDE HIGHER ED (July 2015), <https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts>.

¹⁷ Hannah Graham: Stalked By Evil [Part II], 48 HOURS, CBS NEWS (September 2015), <http://www.cbsnews.com/videos/hannah-graham-deadly-connections-part-1-2/>.

Newport University, again to play college football, Matthew was again accused of sexual assault.¹⁸ As allegations were pending, Matthew dropped out of school before charges were filed and an investigation could commence.¹⁹

In June 2015 Jesse Matthew was convicted and sentenced to a life sentence for the sexual assault and attempted murder of the anonymous 2005 victim.²⁰ Matthew still awaits his summer 2016 murder trial for Hannah Graham where prosecutors will seek the death penalty; charges are waiting to be filed against him for the murder of Morgan Harrington.²¹ The most troubling realization about Jesse Matthew's rape and killing rampage is this fact: he could have been stopped. Matthew is a serial rapist and murderer who escaped detection and punishment for many years. Because there was no information sharing or database connecting the universities in Virginia (or anywhere), Matthew easily transferred from Liberty University to Christopher Newport University. He had "a clean slate" and because he was not formally sanctioned, there was nothing stopping him. Matthew learned two dangerous messages: (1) that colleges and universities are prime places to target victims; and (2) that he, a sexually violent perpetrator, can escape his crimes with barely any punishment. Arguably, these messages encouraged an escalation of violence in that they spurred Matthew to continue raping and perhaps, even to commit murder. Even though Matthew was not enrolled in a college or university during the 2005 sexual assault and the murders of Morgan and Hannah, he got away with at least two sexual assaults on two separate Virginia campuses.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Greg Botelho and Sarah Jorgensen, *Jesse Matthew gets 3 life sentences for 2005 sex assault, abduction*, CNN (October 3, 2015), <http://www.cnn.com/2015/10/02/us/virginia-jesse-matthew/>; see also M. Alex Johnson, *Hannah Graham Suspect Jesse Matthews Convicted in Separate Attempted Murder Case*, NBC NEWS (June 10, 2015), <http://www.nbcnews.com/news/us-news/hannah-graham-suspect-jesse-matthew-convicted-separate-attempted-murder-case-n373346>.

²¹ Hannah Graham: Stalked by Evil [Part II] 48 Hours, CBS NEWS (September 2015), <http://www.cbsnews.com/videos/hannah-graham-deadly-connections-part-1-2/>; see Catherine E. Shoichet, *Hannah Graham Case: Matthew charged with capital murder*, CNN (May 5, 2015), <http://www.cnn.com/2015/05/05/us/jesse-matthew-hannah-graham-capital-murder/>; see also Botelho & Jorgensen, *supra* note 20.

The Jesse Matthew story reveals severe deficiencies in how rape and sexual assaults are dealt with on college and university campuses; specifically, how serial rapists can get away with their crimes and transfer elsewhere to continue their sexual violence unabated. These revelations occur at a time when rape and sexual assault have become an epidemic on college and university campuses.²² Schools have been given the responsibility of adjudicating sexually violent complaints under Title IX, but the procedures and hearings are being criticized as inefficient and ineffective.²³ An important debate is taking place about whether schools should continue to have the opportunity and responsibility to adjudicate these crimes or whether rape and sexual assault should instead be left to the criminal justice system.²⁴

In this Note, I will focus on two key aspects of the Title IX adjudication system: the lack of information sharing processes and the weak penalties for responsible sexual assailants. This Note proposes that colleges and universities permanently mark past occurrences of sexual crimes on students' transcripts to inform other colleges and universities and to eliminate or minimize any inter-college serial rape and sexual assault. A legal obligation to share critical information should be created in the Title IX regulatory infrastructure.

Part I of this Note discusses the historical evolution of how Title IX came to incorporate sexual violent crimes on colleges and universities. Moreover, Part I defends the existence of Title IX. Specifically, it evaluates the value of the "Dear Colleague" letter ("the Letter"),²⁵ which outlines the procedures and responsibilities

²² See Sexual Assault on Campus Statistics, American Association of University Women (AAUW), accessed Feb. 9, 2015, <http://www.aauw.org/what-we-do/legal-resources/know-your-rights-on-campus/campus-sexual-assault/#stats>.

²³ See, e.g. Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 16, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> (critiquing the consent and crime definition ambiguity, unfair hearing procedures and lenient punishment measures, and Title IX procedures); see also Jeannie Suk, "Courts, Not Campuses, Should Decide Sexual Assault Cases" (Sept. 16, 2015) (arguing that campus sexual assault tribunals lack fairness and result in disproportionate outcomes); see generally, Janet Halley, *Trading the Megaphone for the Gravel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, (2015).

²⁴ See *id.*

²⁵ RUSSLYNN ALI, DEAR COLLEAGUE LETTER, OFFICE OF THE ASSISTANT SECRETARY, DEP. OF EDU. 2, 11 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

of educational institutions to protect students and enforce a discrimination-free (specifically sexual violence free) environment on campuses. Part I concludes by discussing sanctions imposed on schools for non-compliance of Title IX procedures and thus, the limited success of Title IX on campuses.

Part II briefly discusses critiques of Title IX but focuses on two major flaws: the nonexistent information sharing among schools and the lenient or nonexistent punishment imposed on perpetrators.

Further, Part III advocates marking students' transcripts with permanent notations. This section looks at new Virginia and New York legislation and proposes a similar federal law to require colleges and universities to create a permanent record on student transcripts of sexual violent crimes. This federal measure will enable communication and notice between schools and deter serial rapists on and between college campuses. The transcript notation itself will also act as a punishment because it has inescapable future consequences. Further, this Part will then recommend a legislative framework for all states across America to follow. Part III concludes by addressing the possible concerns that have been raised in relation to transcript notations and argues that these concerns are misplaced. The silence must finally be broken; there is no excuse for other tragedies like Hannah Graham and Morgan Harrington.²⁶

PART I

UNDERSTANDING THE TRADITIONAL AND CURRENT TITLE IX

Title IX of the Education Amendments of 1972 ("Title IX") provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program

²⁶ Please note: males are also victims of rape and sexual assault on college and university campuses even though females are sexually victimized much more than males. White House Task Force to Protect Students From Sexual Assault (April 2014), *Not Alone: The First Report of White House Task Force to Protect Students from Sexual Assault*, Washington, DC. For the purposes of this note, I will only focus on female undergraduate student victims of sexual violence.

or activity receiving Federal financial assistance.”²⁷ Congress’ principal purpose in enacting Title IX was to ensure equal educational opportunities between men and women at institutions that received federal funding.²⁸ The statute conditions “an offer of federal funding on a promise by the funding recipient not to discriminate.”²⁹ Thus, Title IX imposes schools to sustain practices, policies and programs that are not discriminatory against anyone based on sex.³⁰ But “discrimination based on sex” is extremely broad. What constitutes discrimination based on sex and how does this relate to sexual violence on college campuses?

A. *The Road to Include Sexual Harassment in Title IX*

Title IX was the first federal law to prohibit sex discrimination in schools.³¹ As it reads, nothing in the statute implicates or explicitly states anything in relation to “adjudicat[ing] claims of sexual violence on college campuses.”³² In fact, the legislative history and the first seven years following the adoption of Title IX are devoid of any specific intention to pursue claims of sexual violence.³³ The advocacy to include sexual violence within the scope of Title IX began in 1979, when feminist author Catharine MacKinnon published a revolutionary book, arguing, “sexual harassment is a form of sexual discrimination.”³⁴ In 1981, U.S.

²⁷ 20 U.S.C. §1681(a) (2012).

²⁸ Lindsay C. Ferguson, *Whistle Blowing Is Not Just for Gym Class: Looking into the Past, Present, and Future of Title IX*, 39 TEX. TECH L. REV. 167, 171 (2006); see Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 179 (2005) (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)) (“Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also ‘to provide individual citizens effective protection against those practices.’”).

²⁹ Ann K. Wooster, SEX DISCRIMINATION IN PUBLIC EDUCATION UNDER TITLE IX— SUPREME COURT CASES, 158 A.L.R. Fed. 563 § 2(a) (1999); see Guardians Ass’n v. Civil Serv. Comm’n of City of NY, 463 U.S. 582, 594 (1983).

³⁰ Wooster, *supra* note 29.

³¹ David Sadker, *What is Title IX?*, AMERICAN UNIVERSITY, <http://www.american.edu/sadker/titleix.htm> (last visited Nov. 7, 2018).

³² Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 51 (2013).

³³ *Id.*

³⁴ CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 143-49 (1979). MacKinnon’s novel focuses on sexual harassment of women in a work environment and labels sexual harassment as a social issue. See generally *id.* She further proposes a legal argument that sexual harassment is discrimination based on sex. *Id.* (“The greater criticism may be [the law’s] consistent failure to take the shorter step of

Department of Education's Office for Civil Rights ("OCR") issued administrative guidelines, which defined sexual harassment as strictly pertaining to and prohibiting teacher-to-student harassment.³⁵ However, the OCR failed to address the issue of peer sexual harassment, and the reaches of Title IX were still very much limited.³⁶

In the years following, the Supreme Court also acknowledged sexual harassment as Title IX discrimination³⁷ and allowed private claims under Title IX to recover monetary damages for teacher-to-student harassment.³⁸ However, the question regarding student-to-student harassment remained untouched.

1. Emergence of Student-to-Student Sexual Harassment

Then, the Supreme Court's pivotal decision in *Davis v. Monroe County Board of Education*³⁹ in 1999 held that schools receiving federal funding could be accountable for student-on-student sexual harassment,⁴⁰ and that Title IX encompasses peer sexual harassment. The Court held that Title IX is violated when sexual harassment is "so severe, pervasive, and objectively offensive" that it deprives the victims' access to "educational opportunities or benefits provided by the school."⁴¹ Even though *Davis* dealt with student sexual harassment between elementary school children,

recognizing that the constituent acts of sexual harassment were actionable all along if existing doctrines had been applied to them." *Id.* at 158).

³⁵ OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981). The guidelines defined sexual harassment as "verbal or physical conduct of a sexual nature, imposed on the basis of sex, *by an employee or agent of the recipient*, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title IX." *Id.* (emphasis added).

³⁶ *Id.*

³⁷ See *Gebser v. Lago Vista Independent School Dist.* 524 U.S. 274, 281 (1989); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74-75 (1992).

³⁸ *Franklin*, 503 U.S. at 63-64, 76 (holding that when a high school student was subjected to sexual harassment of forcible kissing, sexually lewd conversations, and coercive intercourse by her coach and teacher, she was entitled to a remedy of damages under Title IX).

³⁹ 526 U.S. 629, 653-54 (1999).

⁴⁰ *Id.* at 650, 653 (1999).

⁴¹ *Id.* at 650.

the dissent recognized that “the majority’s holding would appear to apply with equal force to universities.”⁴²

In the decade following the *Davis* decision, Congress and university campuses reacted. Congress required educational institutions to adopt Title IX adjudication processes as part of their obligation to prevent discrimination and the loss of educational opportunities of victims of peer sexual harassment. In 2001, the OCR produced a general sexual harassment guideline for colleges and universities to handle harassment complaints between students and employers, other students and third parties.⁴³ Although a stride forward, the advocate and survivor community of rape and sexual assault were still unsatisfied with how schools were handling sexual harassment incidents and wanted the government to do more.⁴⁴

B. All in favor of Title IX

1. Dear Colleague Letter: How does Title IX work on College Campuses?

In 2011, the OCR unleashed a “Dear Colleague” Letter ⁴⁵ to all colleges and universities to ensure educational equality on campuses and safety from student sexual harassment.⁴⁶ The Letter was the OCR’s first publication on peer sexual harassment on educational campuses.⁴⁷ Its purpose was to clarify the 2001 guidelines, further interpret Title IX, and convey that, “the sexual harassment of students, including sexual violence, interferes with students’ right to receive an education free from discrimination and, in the case of sexual violence, is a crime.”⁴⁸ The Letter

⁴² *Id.* at 667 (Kennedy, J., dissenting).

⁴³ See generally U.S. DEP’T OF EDU. OFFICE FOR CIVIL RIGHTS, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁴⁴ *Id.* at 4. Advocates campaigned for changes in campus disciplinary systems, more thorough investigations, interim remedies for survivors, more informative survivor measures and a lesser burden of proof standard in the adjudication process. *Id.*

⁴⁵ ALI, *supra* note 25.

⁴⁶ Dawn Watkins Wiese and Candice Johnston, *Dealing with Sexual Misconduct Issues on College and University Campuses*, 2015 WL 4512291 at *3.

⁴⁷ Henrick, *supra* note 32, at 50.

⁴⁸ Caroline Heldman and Danielle Dirks, *Blowing the Whistle on Campus Rape*, MS. MAGAZINE (Winter/Spring 2014),

discloses that sexual violence is a type of sexual harassment, which is prohibited under Title IX.⁴⁹ It also defines sexual violence as the “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent,”⁵⁰ and states that “rape, sexual assault, sexual battery, and sexual coercion,” are all sexually violent crimes under Title IX.⁵¹ The Letter received mixed public consensus, but nonetheless, it has been applauded as “one of the most significant developments in the current body of law governing claims of sexual violence on college campuses.”⁵²

It is common for victims of sexual violence to miss class and avoid certain areas of campus out of fear that they might encounter the alleged perpetrator.⁵³ Effectively, student victims suffer academic declination due to class absences, lack of concentration, and the desire to transfer or drop out of school.⁵⁴ Furthermore, sexual violence survivors may experience depression, anxiety, post-traumatic stress disorder, sexually transmitted diseases, substance abuse, pregnancy, and even suicide.⁵⁵ Student sexual harassment conduct thereby creates a hostile environment for the victim when the conduct “is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.”⁵⁶

The Letter also reaffirms the Title IX responsibilities of academic institutions.⁵⁷ Title IX obliges educational institutions to “take immediate action to eliminate the harassment, prevent its

<http://sites.dartmouth.edu/wgst10SA/files/2014/10/Blowing-the-Whistle-on-Campus-Rape.pdf>.

⁴⁹ ALI, *supra* note 25. The Letter defines that sexual harassment is undesired sexual conduct, which includes “unwanted sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of sexual nature. *Id.*

⁵⁰ *Id.* The Letter explains that lack of consent can be due to the person’s intoxication of drugs or alcohol. *Id.* The Letter explains other reasons for a person unable to give consent, such as disability or intellectual abilities. *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*; see Gail McCallion and Jody Feder, *Sexual Violence at Institutions of Higher Education*, CONGRESSIONAL RESEARCH SERVICE (Oct. 2014), <https://www.fas.org/sfp/crs/misc/R43764.pdf>.

⁵⁵ McCallion & Feder, *supra* note 54, at 1.

⁵⁶ ALI, *supra* note 25; Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999).

⁵⁷ ALI, *supra* note 25.

recurrence and address its effects”⁵⁸ if the school “knows or reasonably should know”⁵⁹ about the alleged peer sexual harassment. Despite the location of where the harassment occurred,⁶⁰ the school is required to process all complaints when filed by a student.⁶¹ It is then the school’s duty to take “prompt, thorough and impartial”⁶² action to investigate what occurred.⁶³ Additionally, the Letter establishes that a school must also comply with the procedural requirements of Title IX to ensure that preventative measures for future incidents are implemented and to demonstrate to the student body and campus that sexual harassment and violence is not tolerated.⁶⁴ Regulations require that grievance procedures include “prompt and equitable resolutions” for addressing sexual harassment complaints.⁶⁵ Part

⁵⁸ *Id.* at 4.

⁵⁹ *Id.*

⁶⁰ Even if the harassing conduct occurs off school grounds or during a school-related extracurricular activity, the school can still have an obligation to proceed under Title IX. *Id.*

⁶¹ *Id.* A student has 180 days after the sexual harassment incident to file a complaint under Title IX. Campus Sexual Assault Roundtable, *Hearings on S. 2692 before the Committee on National Security and Public Affairs*, 113th Cong., 2d Sess. (2014) (testimony of Lindy Aldrich).

⁶² U.S. DEPARTMENT OF EDUCATION, *Questions and answers on Title IX and sexual violence*, (April 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-titleix.pdf>. The nature of the school’s specific investigation may vary depending on factors such as the number of students involved, the age of the victim, and the nature of the allegations. ALI, *supra* note 25, at 5. Regardless, all case investigations must be “prompt, thorough, and impartial.” *Id.*

⁶³ A school’s Title IX obligation is not relieved, even if a law enforcement investigation is pursued. *Id.* at 4.

⁶⁴ *Id.* at 5-6. For example, a school must designate at least one Title IX coordinator to oversee the entirety of Title IX complaints and confront any patterns or problems that occur. 34 C.F.R. § 106.8(a). A school must also publish a notice of discrimination to acknowledge the school’s Title IX policies and procedures and make it apparent that the school by no means supports this type of conduct. ALI, *supra* note 25, at 6-7.

⁶⁵ 34 C.F.R. § 106.8(b). Investigations of complaints must be “adequate, reliable and impartial.” ALI, *supra* note 25, at 9. Schools must initiate immediate steps to start the investigation, which includes informing the alleged victim of her right to file a criminal complaint with law enforcement; on average, an investigation consists of sixty days but can vary depending on the complexity of the complaint and the severity of the sexual harassment. *Id.* at 10, 12. Even if the victim decides to commence a criminal investigation, a school cannot delay commencing their own investigation in anticipation of finding the alleged perpetrator guilty. *Id.* Regardless of simultaneous investigations, the school must initiate their own investigation promptly after a complaint is filed. *Id.*

of the grievance procedures comprise of schools conducting their own hearings under a preponderance of evidence standard.⁶⁶

Notably, the Letter explains that Title IX does not mandate individual grievance procedures for responsible students. Instead, the statute allows colleges and universities to impose their own student disciplinary procedures.⁶⁷ For instance, specific disciplinary sanctions such as suspension from extracurricular activities or expulsion from the school are not included in the grievance procedures. The Letter affirms that Title IX only requires a school to take necessary strides to protect the alleged victim, such as changing students' academic classes or living arrangements.⁶⁸ Thus, postsecondary institutions are given freedom and flexibility under Title IX to impose sanctions as it deems fit.

2. Why Campus Victims Need Title IX

"Rape is the most common violent crime on American college campuses today."⁶⁹ In 2009, the Campus Sexual Assault Study, distributed by the National Institute of Justice, validated that 19% of college women were victims of sexual assault.⁷⁰ Many experts believe that this statistic significantly underestimates the actual occurrence of sexually violent crimes because of low incident

⁶⁶ *Id.* at 10-11. Preponderance of evidence standard is consistent with Title IX standards and essentially means, "more likely than not that sexual harassment or violence occurred." *Id.* at 11. Prior to 2014, some schools chose to use the "clear and convincing standard," a higher standard of proof that is not equitable and inconsistent with Title IX standards. *Id.* But in 2014, the U.S. Department of Justice changed that and required that all federal funding recipients abide by a preponderance of evidence standard in proceedings for rape and sexual assault. See U.S. DEPARTMENT OF EDUCATION, *supra* note 62. In comparison, this standard significantly differs from the beyond a reasonable doubt standard used in the criminal justice system. Furthermore, Title IX coordinators, investigators, adjudicators, fact-finders, and decision-makers must all have expertise and knowledge with handling sexual harassment claims. ALI, *supra* note 25, at 12.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Rana Sampson, *Acquaintance Rape of College Students*, 11, (2003) available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/8e/e1.pdf.

⁷⁰ Christopher P. Krebs PhD, Christine H. Lindquist PhD, Tara D. Warner MA, Bonnie S. Fisher PhD and Sandra L. Martin PhD, *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, JOURNAL OF AMERICAN COLLEGE HEALTH, 639-649, (2009) DOI: 10.3200/JACH.57.6.639-649.

reporting on campus⁷¹ because 90% of rape and sexual assault survivors do not report their attacks.⁷² Commentators have disclosed several possible explanations for lack of reporting, such as ambiguity about the definition of rape or sexual assault,⁷³ “avoiding further trauma and shame,”⁷⁴ and unenforceable academic policies and practices.⁷⁵ Another explanation is the fact that acquaintance rape and sexual assault accounts for 75-90% of rapes or sexual assaults on campuses.⁷⁶ Thereby, “knowing the perpetrator is even more likely to discourage reporting at academic institutions.”⁷⁷

But, experts have noted that Title IX adjudication actually helps to decrease this underreporting.⁷⁸ These processes can encourage more victim reporting, compared to the criminal justice system, due to their variety of services and benefits offered through the victims’ own academic institutions.⁷⁹ Therefore, it is necessary for undergraduate female victims to have the option of Title IX adjudication.

3. Non-compliance with Title IX

Like any other law or statute, not everyone complies. Thus, the OCR enforces compliance of schools with Title IX procedures.⁸⁰ The OCR takes administrative action upon receiving a complaint alleging that an educational institution has violated Title IX.⁸¹ Thereafter, the OCR conducts a comprehensive investigation,

⁷¹ David DeMatteo, Meghann Galloway, Shelby Arnold and Unnati Patel, *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, Psychology, PUBLIC POLICY, AND LAW, Vol. 21 No. 3, 227-238 (2015).

⁷² Bonnie S. Fisher et. al., *The Sexual Victimization of College Women*, U.S. DEPT OF JUSTICE 10 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

⁷³ *Id.*

⁷⁴ DeMatteo et. al., *supra* note 71, at 228.

⁷⁵ *Id.*; Karjane, H.M., Fisher, B.S., & Cullen F.T. (2005) Sexual assault on campus: What colleges and universities are doing about it, U.S. Department of Justice.

⁷⁶ Karjane et. al., *supra* note 75.

⁷⁷ Claire McCaskill, *Sexual violence on campus: How too many institutions of higher education are failing to protect students*, (July 9, 2014), <http://www.mccaskill.senate.gov/surveyreportwithappendix.pdf/>.

⁷⁸ DeMatteo et. al., *supra* note 71, at 229.

⁷⁹ *Id.* For instance, schools can offer “counseling and academic support.” *Id.*

⁸⁰ Wiese & Johnston, *supra* note 46, at *2.

⁸¹ Henrick, *supra* note 32, at 55.

which includes reviewing the school's institutional procedures and policies, examining the actions the school took to resolve the complaint and additionally, exploring the school's past responses to sexual harassment cases.⁸² If the school is found in violation of Title IX, the OCR "attempts to secure voluntary compliance."⁸³ This includes, but is not limited to, having institutions change their procedures, policies and resource allocations in relation to sexual harassment incidents.⁸⁴ If those efforts are unsuccessful, the OCR has the power to submit the school to the Justice Department for criminal prosecution and can initiate proceedings to "terminate the institution's federal funding."⁸⁵

Title IX is only as effective as the remedy it provides. In most circumstances, the threat of terminating federal funding is severe enough to gain voluntary compliance with the OCR's requests.⁸⁶ However, a non-complying school can be given substantial financial sanctions for Title IX violations.⁸⁷ Moreover, another consequence of Title IX violations is that the media frequently labels those schools as enabling "dangerous cultures."⁸⁸ This press branding, whether truthful or not, ultimately damages the schools' reputations and leads to serious financial repercussions, such as declines in student enrollment.⁸⁹

As of January 2015, 106 colleges and universities were under investigation by the OCR for how they handled campus rape and sexual assault cases.⁹⁰ This high number of open investigations reflects the struggle of colleges and universities to meet the

⁸² See U.S. DEPT OF EDU. OFFICE FOR CIVIL RIGHTS, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 15 (2001); OCR Complaint Processing Procedures, U.S. DEPT OF EDU. OFFICE FOR CIVIL RIGHTS (Jan. 8, 2010), <http://www.ed.gov/about/offices/list/ocr/complaints-how.html>.

⁸³ *Id.*

⁸⁴ Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 221-222 (2011).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Wiese & Johnston, *supra* note 46, at *7.

⁸⁹ *Id.*

⁹⁰ *Id.* at *6; see generally U.S. DEPARTMENT OF EDUCATION, *U.S. Department of Education releases list of higher education institutions with open Title IX sexual violence investigations* (May 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

demands of the federal law. The number also attests to the limited success of the Letter and Title IX adjudication. Even with full compliance, many critics continue to argue that Title IX adjudication is not appropriate and does not fully address and solve the problem of rape and sexual assault on campuses.

PART II

THE GAPS IN TITLE IX ADJUDICATION

Critiques of Title IX believe that too many problems exist with the design flaws and execution of Title IX and that schools are simply unable to deal with such complex and serious cases. To example a few, one common critique is that alleged perpetrators of sexual harassment crimes receive less procedural due process protection under Title IX proceedings.⁹¹ For example, alleged accusers are not afforded the right to an attorney or the right to confront their accuser at trial, both rights afforded in the criminal justice system.⁹² Critics also argue that Title IX enforcement is problematic on campuses due to lack of funding; “lack of funding can hinder a college’s ability to respond in this area because enforcement can be expensive.”⁹³ Furthermore, Title IX critics believe that the adjudication process itself lacks fairness, such as failure to identify the alleged witnesses.⁹⁴ The unfair procedures result in inaccurate outcomes, and thus, “reinforce[] society’s skepticism toward rape victims.”⁹⁵

This Note analyzes two particular flaws that significantly contribute to the crisis of serial rape and sexual assault on college campuses: non-existent information among colleges and the lenient punishments imposed.

A. Non-existent Information Sharing of Serial Rapists Between

⁹¹ DeMatteo et. al., *supra* note 71, at 229.

⁹² *Id.*

⁹³ Wiese & Johnston, *supra* note 46, at *4.

⁹⁴ Suk, *supra* note 23.

⁹⁵ *Id.*

Colleges Universities

No one knew of Jesse Matthew's dangerous sexually violent past. His friends and family were kept in the dark; more importantly, so was Christopher Newport University, where he transferred into after committing an earlier sexual assault at another university.⁹⁶ Years later, Matthew was exposed as a serial rapist and murderer, but at the cost of an additional three rapes, one attempted murder, and the murders of Hannah Graham and Morgan Harrington.⁹⁷ As horrific as his record is, Jesse Matthew's commission of numerous rapes on or about college campuses is not at all exceptional.

Unfortunately, serial sexual perpetrators are all too common in our colleges and universities. In a 1997 study, "96 college men accounted for 187 rapes."⁹⁸ These shocking results were later corroborated in a 2002 study, conducted by David Lasiak and Paul M. Miller.⁹⁹ This study consisted of 1,882 male students from a mid-sized university, who were offered several dollars to participate in a questionnaire that asked about "childhood experiences and adult functioning."¹⁰⁰ In order for a participant to be classified as a "rapist," the participant had to respond in the affirmative to particular questions, by which a series of follow-up questions were asked in regards to the participant's age, number of victims and number of times it happened.¹⁰¹ The results revealed that 6.4% admitted to campus rape or attempted rape.¹⁰² Of admitted rapists, 63.3% confessed that they had committed multiple offenses, "either against multiple victims, or more than

⁹⁶ See *infra* Introduction.

⁹⁷ *Id.*

⁹⁸ Sampson, *supra* note 69.

⁹⁹ David Lasik & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17(1) VIOLENCE AND VICTIMS, 78 (2002).

¹⁰⁰ *Id.* at 76. Participants picked up questionnaire packets at distribution tables on campus and returned them after they were completed in private to receive the payment. *Id.*

¹⁰¹ *Id.* at 77-78. Questions included "behaviorally explicit language to describe particular acts, but never used words such as 'rape'. . ." *Id.* at 77. For example, one of the questions asked: "Have you ever been in a situation where you tried, but for various reasons, did not succeed, in having sexual intercourse with an adult by using or threatening to use physical force (twisting their arm, holding them down, etc.) if they did not cooperate?" *Id.*

¹⁰² *Id.* at 78.

once against the same victim,”¹⁰³ totaling to approximately six rapes each.¹⁰⁴ Thus, out of the entire sample of men in the study, a mere 76 men were responsible for an estimated 439 rapes and attempted rapes.¹⁰⁵

These results are shocking; Americans and the media do not have any understanding of the prevalence of serial perpetrators and how college rapists frequently have several victims. This continued ignorance is dangerous and harmful, and ironically contributes to more recidivistic offending. Thus, denial of ignorance has led to failures to address serial perpetrators in Title IX adjudication. Without procedural mechanisms in place, they go on to reoffend.

Currently, schools do not share with one another the information regarding outcomes and statuses of responsible students. If a student transfers at the end or during their Title IX proceedings for sexual violence charges, there is no systematic mechanism by which a new prospective college can learn about those charges or proceedings. The ‘home’ college sends the students’ official transcript to the prospective college without any indication of the alleged charges or outcomes. At best, the student may reveal the pending allegations to an open-ended question on an application to the new college, but that is highly unlikely due to the student’s self-interest. Frequently, the new unsuspecting university admits the applicant or transfer student who then poses a danger to a new student body. The lack of information sharing and communication between colleges and universities allows serial rapists to continue victimizing elsewhere on other campuses.

For example, in May 2013, Samuel Ukwuachu, an All-American freshman at Boise State University was eliminated from the team for “violating team rules.”¹⁰⁶ He was coincidentally dismissed from the football team after an alleged sexual harassment incident

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 80.

¹⁰⁵ *Id.*

¹⁰⁶ Jake New, *Black Eye for Baylor*, INSIDE HIGHER ED (Aug. 2015), <https://www.insidehighered.com/news/2015/08/26/baylor-u-facing-questions-over-handling-sexual-assault-involving-football-player>.

with his girlfriend.¹⁰⁷ After transferring to Baylor University to play football in October, a fellow Baylor student came forward alleging that Ukwuachu raped her at his apartment, despite her cries of “no.”¹⁰⁸ The victim pressed criminal charges and Ukwuachu was convicted of sexual assault, where he will be incarcerated for six months and be given ten years on probation.¹⁰⁹ Even though there is dispute among the head coaches at Baylor and Boise State about whether Ukwuachu’s violent past was revealed during the transfer through conversations,¹¹⁰ the lack of official communication between these universities created a loophole for Ukwuachu to assault another victim.

B. Lenient Punishment and Disciplinary Actions

A second concern is that Title IX does not provide guidelines or suggestions regarding disciplinary sanctions that should be imposed on students found responsible of sexual violent crimes. Given wide discretion, schools implement punishments that are merely “slaps on the wrist” and have no significant deterring measure. Some examples are one-semester suspension, sensitivity training, a book report assignment, or probation from extracurricular activities.¹¹¹ One university required the perpetrator to watch an educational clip on sexual violence for a mere twenty-three minutes and follow-up with a two-page reflection essay.¹¹² The control and freedom colleges and universities have over punishment of students are dangerous and contribute to the campus rape and sexual assault epidemic.

The authors of the Campus Sexual Assault Study conducted a study where 5,446 undergraduate women took a cross-sectional, Web-based survey to assess sexual assault victimization.¹¹³ Results highlighted that of the reported rape and sexual assault claims on college and university campuses, less than 1% of

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Art Briles, Baylor’s head coach, stated that there was no mentioning of Ukwuachu’s previous violent incident and why he was kicked off the team. *Id.*

¹¹¹ Rubinfeld, *supra* note 23; Heldman & Dirks, *supra* note 48.

¹¹² Heldman & Dirks, *supra* note 48.

¹¹³ Krebs et. al., *supra* note 70, at 639-649.

responsible perpetrators received disciplinary punishment or sanctions from the university.¹¹⁴ Because Title IX adjudication procedures are in the hands of educational institutions and not law enforcement, there is no jail time. The most severe punishment is expulsion, which is uncommon and at some schools, nonexistent. “Right now, some colleges and universities are more inclined to expel a student for cheating on an exam than for committing sexual assault.”¹¹⁵ Rolling Stone Magazine attempted to expose this problem and the ineffective handling of sexual violence cases in its November 2014 article “A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA,” about a brutal fraternity gang rape of a University of Virginia’s freshman.¹¹⁶ Even though Rolling Stone retracted its story due to ethical issues and inaccuracy, it did accurately state that since its foundation in 1819, UVA has never expelled a single student for rape or sexual assault,¹¹⁷ even in a case where the accused admitted to the crime.¹¹⁸

The insufficient or nonexistent disciplinary actions implemented by schools are not limited to the University of Virginia. In the case of *J.K. v. Ariz. Bd. of Regent*,¹¹⁹ a student athlete at Arizona State University (ASU) was expelled because of his sexual harassment behavior during a summer transition program.¹²⁰ Despite his sexual remarks, sexual touching, exposing himself to other students, and being labeled as “high risk,” he was later re-admitted to ASU and the football team; the student

¹¹⁴ *Id.*

¹¹⁵ Kirsten Gillibrand, At University At Buffalo, Senator Gillibrand & Lieutenant Governor Hochul Meet With Students And Lead Organizing Effort to Combat Sexual Violence on College Campus (Mar. 2, 2015), <https://www.governor.ny.gov/news/university-buffalo-senator-gillibrand-lieutenant-governor-hochul-meet-students-and-lead>.

¹¹⁶ Margaret Hartmann, *Everything We Know About the UVA Rape Case*, NY MAGAZINE (July 30, 2015), <http://nymag.com/daily/intelligencer/2014/12/everything-we-know-uva-rape-case.html>.

¹¹⁷ Short History of U.V.A., *Founding of the University*, UNIVERSITY OF VIRGINIA, <http://www.virginia.edu/uvatours/shorthistory/>.

¹¹⁸ Sara Ganim, *Beyond Rolling Stone Story: How does UVA handle campus sexual assault?* CNN (April 6, 2015), <http://www.cnn.com/2015/04/06/us/uva-sexual-assault-investigation/>. “UVA’s emphasis on honor is so pronounced that since 1998, 183 people have been expelled for honor-code violations such as cheating on exams. And yet paradoxically, not a single student at UVA has ever been expelled for sexual assault.” *Id.*

¹¹⁹ 2008 U.S. Dist. LEXIS 83855, at *13.

¹²⁰ *Id.* at * 4-6.

received no supervision or disciplinary action from his coaches or authority.¹²¹ Within the year, he allegedly raped another student.¹²² Moreover, in 2013, a University of Connecticut student was raped in her dorm room and the student perpetrator was expelled.¹²³ Here, the Vice President of Student Affairs soon reinstated the student, determining that expulsion was “too severe.”¹²⁴

Because of this excessive leniency, educational institutions are enabling campus rape and sexual assault and consequently, guilty students are “get[ing] away with their crimes.”¹²⁵ Thus, educational campuses are promoting a “rape tolerant campus culture.”¹²⁶ The failure to impose severe punishment and disciplinary actions amounts to tacit approval and contributes to the sexual harassment epidemic on campus. Schools need to execute harsher sanctions, if not through their own institutional procedures, then through a higher authority.

PART III

PROPOSAL: GIVING GUILTY RAPISTS ACROSS AMERICA A PERMANENT RED FLAG

To break the epidemic and to decrease serial sexual violence on American college campuses, a federal law must be enacted under Title IX, requiring both information sharing and harsher punishments. Recently, states such as Virginia and New York have passed new laws, requiring colleges and universities to mark the transcripts of students found responsible for sexual violence. Transcript notations are information sharing and prospective schools will be put on notice. Moreover, transcript notations are also a form of shaming punishment that will impact the students’ academic future and hopefully deter serial perpetrators. Transcript notations will overall provide for a more

¹²¹ *Id.* at 7.

¹²² *Id.* at 8.

¹²³ Heldman & Dirks, *supra* note 48.

¹²⁴ *Id.*

¹²⁵ Rubinfeld, *supra* note 23.

¹²⁶ Heldman & Dirks, *supra* note 48.

communicative and punitive Title IX adjudication system on individual and between campuses.

In order to be effective, transcript notations must be implemented on a national level as part of Title IX, binding all colleges and universities across America. The beginning of this Part presents Virginia and New York's laws, which lay down the foundation for a federal adoption of transcript notations.¹²⁷ This Part then drafts and proposes federal legislation, which is a hybrid of Virginia and New York; it further provides an in-depth deep discussion for three critical design elements: (1) a uniform definition of sexual violence; (2) forgiveness provision; and (3) pending charges.¹²⁸ This Part concludes by addressing possible concerns with transcript notations, which are ultimately misplaced and do not outweigh its tremendous benefits.¹²⁹

A. Virginia and New York Act First

Inspired by the Hannah Graham tragedy,¹³⁰ Virginia passed legislation in February 2015 mandating that colleges and universities in Virginia mark a student's transcript if he or she has been suspended for or dismissed for sexual violence, or withdrew from the college while allegations of sexual violence were still pending.¹³¹ The law states in relevant part:

A. The registrar of each (i) private institution of higher education . . . and (ii) public institution of higher education, or the other employee, office, or department of the institution that is responsible for maintaining student academic records, shall include a prominent notation on the academic transcript of each student who has been suspended

¹²⁷ See *infra* III(A).

¹²⁸ See *infra* III(B).

¹²⁹ See *infra* III(C).

¹³⁰ Laura Vozzella, Jenna Portnoy and Rachel Weiner, *Deals on Ethics Rules, Reporting of Sexual Assaults Wrap Up VA Session*, THE WASHINGTON POST (Feb. 27, 2015), https://www.washingtonpost.com/local/virginia-politics/va-assembly-agrees-on-bill-requiring-more-sex-assaults-be-reported-to-police/2015/02/27/b74d462c-be84-11e4-bdfa-b8e8f594e6ee_story.html; see *infra* Introduction.

¹³¹ *House, Senate Approve Sexual Assault Bills*, RICHMOND TIMES DISPATCH (Feb. 2015), http://www.richmond.com/news/virginia/article_50bc7d86-9ea8-5b57-93ce-b5106572a103.html; see generally Va. Code Ann. § 23-9.2:18 (2015).

for, has been permanently dismissed for, or withdraws from the institution while under investigation for an offense involving sexual violence under the institution's code, rules, or set of standards governing student conduct . . . Such notation shall be substantially in the following form: "[Suspended, Dismissed, or Withdrew while under investigation] for a violation of [insert name of institution's code, rules, or set of standards]." Each such institution shall (a) notify each student that any such suspension, permanent dismissal, or withdrawal will be documented on the student's academic transcript and (b) adopt a procedure for removing such notation from the academic transcript of any student who is subsequently found not to have committed an offense involving sexual violence under the institution's code, rules, or set of standards governing student conduct. For purposes of this section, "sexual violence" means physical sexual acts perpetrated against a person's will or against a person incapable of giving consent.

B. The institution shall remove from a student's academic transcript any notation placed on such transcript pursuant to subsection A due to such student's suspension if the student (i) completed the term of the suspension and any conditions thereof and (ii) has been determined by the institution to be in good standing according to the institution's code, rules, or set of standards governing such a determination.¹³²

Following in Virginia's footsteps, in June 2015, New York became the second state to require its colleges to mark a student's transcript when a student is found responsible.¹³³ The New York law similarly requires colleges and universities to communicate in the student's transcript if he was suspended or dismissed for responsibility of a code of conduct violation, as well as if the

¹³² *Id.*

¹³³ New, *supra* note 16.

student withdrew from the university during pending charges.¹³⁴ The Bill, S5965, states in relevant part:

For crimes of violence, including, but not limited to sexual violence, defined as crimes that meet the reporting requirements pursuant to the federal Clery Act established in 20 U.S.C. 1092(F)(1)(F)(I)(I)-(VIII), institutions shall make a notation on the transcript of students found responsible after a conduct process that they were “suspended after finding of responsibility for a code of conduct violation” or “expelled after finding of responsibility for a code of conduct violation.” For the respondent who withdraws from the institution while such conduct charges are pending, and declines to complete the disciplinary process, institutions shall make a notation on the transcript of such students that they “withdrew from conduct charges pending.” Each institution shall publish a policy on transcript S. 5965 notations and appeals seeking removal of a transcript notation for a suspension, provided that such notation shall not be removed prior to one year after conclusion of the suspension, while notations for expulsion shall not be removed. If a finding of responsibility is vacated for any reason, any such transcript notation shall be removed.¹³⁵

¹³⁴ *Id.*; Tyler Kingkade, *New York Poised To Become Second State Requiring Sexual Assault Offenses On Transcripts*, THE HUFFINGTON POST (June 18, 2015), http://www.huffingtonpost.com/2015/06/18/new-york-sexual-assault-transcripts_n_7606196.html.

¹³⁵ 2015 Sess. Law News of N.Y. Ch. 76 (S. 5965) (McKinney). This bill is part of an amended act to the New York Education Law, which revises college and university prevention, policies and response procedures in relation to rape, sexual assault, domestic violence, dating violence, and stalking on campus. *Id.* This bill was part of New York Governor Andrew Cuomo’s “Enough is Enough” legislation, which also adopts other comprehensive procedures and guidelines such as enhanced access to law enforcement, an amnesty policy and an affirmative consent definition to engage in sexual activities. *See generally, Enough is Enough: Combating Sexual Assault on College Campuses*, <http://www.nygov.gov/programs/enough-enough-combating-sexual-assault-college-campuses>. At St. John’s University in Queens, New York, for example, Article 129-B was effective October 5, 2015. Request a Transcript, ST. JOHN’S UNIVERSITY, <http://www.stjohns.edu/academics/office-registrar/request-transcript>. The university’s

B. United We Stand: Proposing Federal Legislation for Marked Transcripts Across America

One similarity between the Virginia and New York laws are their limited scope; both are state initiatives, which target rape and sexual assault on campuses, but do not grow out of Title IX federal regulations. Even though all schools within the states of Virginia and New York are bound to follow these procedures, the educational institutions in the rest of the country are not. Discussion about making this idea a federal requirement is in the air,¹³⁶ but nothing is being done. Even though Virginia and the Empire State have successfully passed legislation mandating these actions, the central purpose of marking transcripts (to instill a database that notifies other colleges and universities of a student's past sexual violent actions) cannot be accomplished if only two states have implemented these practices. It defeats the purpose of having notations on a student's transcript because only colleges and universities who are receiving transfer and incoming students from New York or Virginia will have the luxury of being notified.¹³⁷ The results will be severely limited with only 2 of the 50 states implementing these laws.

Moreover, if enacted as federal legislation, the OCR would have the authority to enforce schools to comply with transcript notation procedures and mandate sanctions if necessary.¹³⁸ As described above, the federal sanctions can be hefty with financial penalties and/or the loss of federal subsidies.

Influenced by key aspects of model Virginia and New York laws, this Note proposes the following federal law with three critical design elements in mind. The objective is not to advocate that this exact proposal be enacted in legislation, but to open discussion and

page depicts the procedures and appeal about the transcript notation and publishes the actual language of the law. *Id.*

¹³⁶ New, *supra* note 16.

¹³⁷ For example, a student transferring out of college in New York would have a notation on their transcript reading, "suspended after finding responsibility for a code of conduct violation," if he was found guilty and expelled under Title IX procedures. But, if a student transfers from a college in Texas to a college in Florida, the same issue we are attempting to resolve is still in full effect. Thus, the proposal cannot work on a state-by-state basis.

¹³⁸ See *infra* I(B)(3).

influence a future legislative proposal in relevance to transcript notations on student academic records.

1. Uniform Definition and Trigger of Sexual Violence

The first vital element for a federal law would be a trigger definition for sexual violence that would trigger notating transcripts. A federal law would have one uniform definition. The Virginia and New York laws each define “sexual violence” differently. The Virginia law states that the “bill defines sexual violence as physical sexual acts committed against a person’s will or against a person incapable of giving consent.”¹³⁹

Distinguishably, the New York law has a much broader definition in effect that it pertains to “crimes of violence”¹⁴⁰ as defined in the federal law, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990) (“Clery Act”).¹⁴¹ The Clery Act requires colleges and universities who receive federal funding to annually report and disclose campus crime and security policies to all enrolled students and employees at the educational institution.¹⁴² Although limited types of crimes are reported under the Clery Act, criminal sexual offenses are included.¹⁴³ “Crimes of violence” encompass “sexual violence” such

¹³⁹ Va. Code Ann. § 23-9.2:18 (2015).

¹⁴⁰ 2015 Sess. Law News of N.Y. Ch. 76 (S. 5965) (McKinney).

¹⁴¹ 20 U.S.C. § 1092(f). In 1985, Jeanne Clery, a student at Lehigh University, was attacked in the middle of the night and was raped, beaten and murdered by another student with an extensive violent criminal record. Mark Fritz, *The Politics of Parental Grieving*, L.A. TIMES, June 3, 1999, at A1. In response to their daughter’s tragedy, the Clerys sued Lehigh arguing that, “that their daughter never would have attended Lehigh if they had known the prevalence of violent crime at the school.” *Id.* The Clerys won, and due to this misfortune and the prevalent violence on college and university campuses, the federal law was adopted. *Id.*

¹⁴² Wiese & Johnston, *supra* note 46, at *2; DeMatteo et. al., *supra* note 71, at 227-238; 34 C.F.R. § 668.41(e).

¹⁴³ 34 C.F.R. § 668.46(c)(1)(ii). The Clery Act requires a more detailed policy statement in regards to sexual assaults on campus. Within the annual report, the school’s sexual assault policy must detail preventative sexual assault programs, spread awareness about forms of sexual assault, and discuss protocol in the case of an incident. 20 U.S.C. §§ 1092(f)(8)(A), (B)(iii). Further, the policy must lay a foundation of procedures and student rights during a disciplinary hearing and mention the possibility of sanctions. 20 U.S.C. §§ 1092(f)(8)(B)(ii), (iv). Compliance with the Act’s reporting procedures are monitored by the U.S. Department of Education (“DOE”) and any violation of the Clery Act can result in civil penalties. *See generally* Diane War and Janice Lee Mann, *The Handbook for Campus Safety and Security Reporting*, U.S. DEPT OF EDU. (Feb. 2011), <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

as sex offenses, but also extend to violent crimes such as murder, robbery, aggravated assault, burglary, motor vehicle theft, manslaughter, and arson.¹⁴⁴ Thus, under the New York law, a student can receive a notation on their transcript for being found responsible for rape or arson, and the notations are indistinguishable. Although it is reassuring that New York will be implementing transcript notations to punish students who commit other severe crimes, the broad definition creates confusion when other violent crimes are lumped together with sexually violent crimes. One of the purposes of the transcript notations is to deter and recognize those who commit rape or sexual assault. Thus, if New York wanted to punish those students who committed other violent crimes as defined by the Clery Act, it should have a different notation than if a student is found responsible for a sexually violent crime.

For the federal law, the best definition to use is the definition under the Title IX because it is an existing federal standard that has embedded familiarity and simplicity. The Letter defines sexual violence as the “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent.”¹⁴⁵ The Letter explains sexual violence includes “rape, sexual assault, sexual battery, and sexual coercion,” which are all forms of sexual harassment embraced under Title IX.¹⁴⁶ Unlike the Clery Act’s definitions, the Title IX definition respects the unique quality and frequency of sexual violence. Therefore, the federal law uniform definition that triggers the transcript notation should be limited to sexually violent crimes as embodied within Title IX.

2. Forgiveness Provision

A second element of the federal proposal would be the forgiveness provisions. A forgiveness provision offers the responsible student a possible opportunity of future relief by expunging the notation from their transcript, provided that certain conditions are met. The expungement conditions should

¹⁴⁴ 20 U.S.C. 1092(F)(1)(F)(I)(I)-(VIII).

¹⁴⁵ *ALI*, *supra* note 25. The Letter explains that lack of consent can be due to the person’s intoxication of drugs or alcohol. *Id.* The Letter explains other reason for a person’s inability to give consent, such as disability or intellectual abilities. *Id.*

¹⁴⁶ *Id.*

vary, depending on whether the responsible student was suspended or expelled. A suspension notation conveys to other educational institutions that the offense was less severe and thus the student received a lesser sanction. Such a student should have a more generous opportunity to appeal and expunge the notation compared to a student who was expelled for a more severe sexual offense. Again, the Virginia and New York laws provide sample provisions to consider.

a. Suspension

The Virginia law conditions that a student who is suspended for “an offense involving sexual violence under the institution’s code, rules or set of standards governing student conduct,” will receive a notation on their transcript.¹⁴⁷ The law provides that a suspension notation can be removed if the student completes the suspension term and any assigned conditions, in addition to be in “good standing.”¹⁴⁸ This forgiveness provision is very ambiguous. The language does not provide for a time frame limiting when the student can remove the suspension notation. Further, the provision does not indicate if removal is accompanied by an appeal process, which would imply that removal is not definitive and only occurs if the student wins on appeal. Also, the provision fails to define what the educational institution considers to be “good standing.” These discrepancies create major loopholes.

Conversely, New York has an appeals process to remove a transcript notation for suspended students.¹⁴⁹ The law affirms that students who are suspended can only appeal to remove the notation one year after the completion of the suspension.¹⁵⁰ This time frame is fair, unambiguous and should be included in the drafting of a federal law. However, New York does not mention anything about the suspended student being in good standing.

¹⁴⁷ Va. Code Ann. § 23-9.2:18 (2015).

¹⁴⁸ *Id.*

¹⁴⁹ 2015 Sess. Law News of N.Y. Ch. 76 (S. 5965) (McKinney).

¹⁵⁰ *Id.*

b. Expulsion

A forgiveness provision for expulsion of a student responsible for sexual violence must differ from conditions set forth for suspension. Virginia only provides that a student who is “permanently dismissed for” sexual violence will receive a notation on his transcript.¹⁵¹ The law does not touch upon any means to remove the notation for expelled students. On the other hand, New York takes an affirmatively harsh stance and states that notations for expelled students cannot ever be removed. Although this harsh stance may deter serial rape and sexual assault, it is important that the legislature recognize that these students are not being prosecuted under the criminal justice system, which allows for harsher punishment and more procedural protections for the accused.¹⁵²

Title IX adjudications must be different from the criminal justice system.¹⁵³ Under the Title IX adjudication process, the burden of proof is “preponderance of the evidence.”¹⁵⁴ This is a lower evidentiary standard than the “beyond reasonable doubt” standard used in the criminal justice system,¹⁵⁵ and thus, the inclusion of a forgiveness provision is reasonable.¹⁵⁶ The focus of the transcript notations is to deter rape and sexual assault *on*

¹⁵¹ 2015 Sess. Law News of N.Y. Ch. 76 (S. 5965) (McKinney).

¹⁵² For example, an expelled student not being afforded the opportunity to expunge the notation would be too similar to a felony conviction under criminal justice system. In the criminal justice system, if a man is convicted guilty of a rape, he is charged with a felony on his record and he is required to register as a sex offender. Both are permanent and severe actions.

¹⁵³ There must be a difference between punishment under Title IX adjudication and the criminal justice system because of the significant differences such as the procedures, lower burden of proof, and lack of involved law enforcement.

¹⁵⁴ ALI, *supra* note 25.

¹⁵⁵ See Criminal Cases, Burden of Proof, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases>.

¹⁵⁶ Another procedural difference between the two systems is the standard of consent. In states such as New York and California, educational institutions are required to adopt affirmative consent, defined as “knowing, voluntary, and mutual decision among all participants to engage in sexual activity.” Enough is Enough: Combating Sexual Assault on College Campuses, THE STATE OF NEW YORK (July 7, 2015), <https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses>; see Kevin de Leon & Hannah-Beth Jackson, *Why We Made ‘Yes Means Yes’ California Law*, THE WASHINGTON POST (Oct. 13, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/>. On the other hand, the criminal justice system defines consent differently under each state’s penal or common law.

campus and between campuses and not necessarily “life after college.” Hence, the idea of complete permanence should not be part of the Title IX procedures and should solely be applicable to sexual crime convictions prosecuted in the “real world” within the criminal justice system.

The absence of a forgiveness clause for expelled students is too severe and an alternative is vital. Complete permanence is too rigorous but some type of permanence is necessary for a powerful, deterrent message to be understood. The federal law should therefore provide a forgiveness provision, encompassing an appeal to “seal,” not remove, the notation on the expelled students’ transcript, and only upon graduating from college.¹⁵⁷ This alternative concept of sealing is based on New York’s sealing record criminal procedures.¹⁵⁸ For instance, in the state of New York, a person cannot expunge particular crimes from their record but can seal them, which means that the crime is invisible to the public, such as a non-law enforcement employer.¹⁵⁹ This would ensure disciplinary consequences upon the student in several ways. First, the student would have a mark of permanence that would deter him to not commit further acts of sexual violence on campus. Second, if the student transfers, this instills that the notation will remain on his academic record. Third, even though the notation may affect internship or job opportunities of the student during college years, it will be unknown to employers and will provide repose for a student perpetrator to proceed with their lives.¹⁶⁰

¹⁵⁷ This term would be regardless of if the student takes four years or more to graduate, if the student transfers or if the student completes a bachelor’s degree online.

¹⁵⁸ See N.Y. CRIM. PROC. LAW § 160.50 (McKinney, 2009); N.Y. CRIM. PROC. LAW § 160.58 (McKinney, 2009).

¹⁵⁹ How to Expunge a Criminal Record in New York, FINDLAW (Jan. 13, 2014), <http://statelaws.findlaw.com/new-york-law/how-to-expunge-a-criminal-record-in-new-york.html>. Certain government agencies can still have access to view sealed records but the public cannot. *Id.*

¹⁶⁰ In respect to graduate schools, such as law schools and medical schools, it is important for the notation to be visible to authorities because some graduate schools are affiliated with larger university and college campuses. This contributes to the serial rape issue on educational campuses unlike employment away from campus grounds.

3. Pending Charges

A final context for which forgiveness provisions must account is the context of pending charges against the student. Virginia tackles this by stating that a transcript notation must be made if a student “withdraws from the institution while under investigation.”¹⁶¹ However, it is unclear whether this notation can be removed, even when a situation is resolved. Similarly, the New York law exemplifies that a student who withdraws while charges are pending and “declines to complete the disciplinary process” will receive a notation that he “withdrew with conduct charges pending.”¹⁶² New York further indicates that if the charges against the student are vacated, the transcript notation will be removed.

The federal pending notation should read, “withdrew with conduct charges pending,” which means that the student either withdrew before an investigation commenced or during the investigation and before disciplinary procedures. This is important for other institutions seeking these transfer students. Colleges and universities should be aware of any potential sexual violence charge against a student they are accepting to insure that it has a complete understanding of the circumstances, accept any potential liability, and to assess any potential danger that student may impose on others. This notation also places a “yellow flag” on that student so that the institution can keep an eye on the student in the case that a situation arises again. Moreover, as New York indicates, if responsibility against the student is vacated, the transcript notation will be removed. Furthermore, the pending transcript notation should be distinctive from notations of suspension or expulsion whether it be italicized, in color, or in another font.

4. Federal Legislative Draft

Incorporating all of the discussed elements and aspects in the aforementioned,¹⁶³ and taking language from both the Virginia

¹⁶¹ Va. Code Ann. § 23-9.2:18 (2015).

¹⁶² 2015 Sess. Law News of N.Y. Ch. 76 (S. 5965) (McKinney).

¹⁶³ *Infra* IV(B)(1)-(4).

and New York laws,¹⁶⁴ the federal law I propose would read as follows,

A. The purpose of this section pertains to crimes of sexual violence, as defined as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent,” and includes all forms of sexual harassment encompassed under Title IX which includes, “rape, sexual assault, sexual battery, and sexual coercion.”¹⁶⁵ Academic institutions shall make a notation on the transcript of any student found responsible under Title IX procedures if they were suspended or expelled for a code of conduct violation. Such notation will be in the following form: “[Suspended, Dismissed, or Withdrew with conduct charges pending] for a violation of [insert name of institution’s code, rules or set of standards].” As for a student who withdraws from the institution before an investigation commences or at the duration of the investigation, the institution shall make a notation on the transcript- in color or font- that they, “withdrew with conduct charges pending.”¹⁶⁶

B. Upon a successful appeal, the institution may remove a transcript notation from a student’s academic transcript for a suspension, no earlier than one year after the conclusion of the suspension, and if the student is in good standing with the institution. Upon a successful appeal, the institution may seal the transcript notation for expulsion, no earlier than graduation, and if the student is in good standing with the institution. Good standing shall be defined as a combination of good academic standing under terms defined by the institution’s code and any citations for alcohol,

¹⁶⁴ See Va. Code Ann. § 23-9.2:18 (2015); 2015 Sess. Law News of N.Y. Ch. 76 (S. 5965) (McKinney).

¹⁶⁵ *ALI, supra* note 25.

¹⁶⁶ Va. Code Ann. § 23-9.2:18 (2015).

illegal substances, and criminal conduct. More than two citations disqualify the opportunity for an appeal.

C. If finding responsibility is vacated for any reason, any such transcript notation will be removed.

D. All institutions shall publish a policy on transcript notation procedures and the appeals.

C. Opposing Transcript Notations: Possible Concerns

1. FERPA Regulations

“The Family Educational Rights and Privacy Act (FERPA)¹⁶⁷ is a federal law that protects the privacy of student educational records.”¹⁶⁸ FERPA applies to all educational institutions that receive federal funding from the U.S. Department of Education.¹⁶⁹ At first blush, a concern with transcript notations is a student’s right to privacy because FERPA generally forbids nonconsensual admission of information from a student’s “education record.”¹⁷⁰ However, this concern is misplaced because the concept of transcript notations falls within the uses allowed by FERPA. First, FERPA permits academic institutions to disclose records, absent of consent, to another college or university where that student is transferring.¹⁷¹ Second, the disclosure of records also applies when specified officials need the information for “evaluation purposes,”¹⁷² which is applicable here if another university is considering accepting that student. Third, academic records can be released in situations of a “safety emergency,”¹⁷³ which can arguably be applicable here because a student

¹⁶⁷ 20 U.S.C. §1232g; 34 CFR Part 99.

¹⁶⁸ Family Educational Rights and Privacy Act (FERPA), U.S. DEPARTMENT OF EDUCATION, <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.

¹⁶⁹ *Id.*

¹⁷⁰ *Supra* note 43, at 13. In most circumstances, schools must have written permission from the student (who is over eighteen years old) to release any information from the academic transcript. Family Educational Rights and Privacy Act (FERPA), U.S. DEPARTMENT OF EDUCATION, <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.

¹⁷¹ 34 CFR §99.31.

¹⁷² *Id.*

¹⁷³ *Id.*

responsible of rape or sexual assault can pose a safety threat to students at other educational institutions. Additionally, New York 129-B, addresses FERPA in its state law. “When such conduct involves students or employees from two or more institutions, such institutions may work together to address the conduct” as long as the collaboration satisfies FERPA regulations.¹⁷⁴

Thus, although those in opposition are concerned about a student’s right to privacy with transcript notations, FERPA is not a relevant concern and does not affect a student’s right to privacy in this context.

2. Mirroring the Criminal Justice System

Recently, efforts to pass a transcript notation law in Maryland failed because of the lack of support from Maryland’s Coalition Against Sexual Assault (MCASA). This organization consists of seventeen rape crisis centers in Maryland, and the state’s Senate Education, Health & Environmental Matters Committee.¹⁷⁵ MCASA is concerned that branding transcripts would unintentionally turn into an “internal sex offender registry for colleges” and change adjudication proceedings into “fully litigated trials.”¹⁷⁶ MCASA believes this is not the best way to help survivors.¹⁷⁷

MCASA misses the point that transcript notations will help survivors by preventing many from being victimized in the first place. Colleges and universities need an efficient way to track students who have been found responsible for rape or sexual assault under Title IX.¹⁷⁸ Paul Tribble, former Republican U.S. senator and congressman and current president of Christopher Newport University in Virginia,¹⁷⁹ commented on the unique nature of campus serial rapists: “[T]here are individuals who

¹⁷⁴ 2015 Sess. Law News of N.Y. Ch. 76 (S. 5965) (McKinney).

¹⁷⁵ New, *supra* note 16.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Paul Tribble is relevant to this issue because Christopher Newport University in Virginia is the college Jesse Matthews transferred into following his leave and pending allegations of sexual assault from Liberty University, and thus, he has pertinent insight on this issue. *See infra* Introduction.

transfer, and schools who take them in have no knowledge that he or she transferred because there were serious problems. In that situation, other students are being placed at risk.”¹⁸⁰ Part of the problem with college serial rapists is that colleges and universities are more concerned with the present safety on *their* campus and no other campus. They have no regard for the danger this student might impose on another campus.¹⁸¹ The time has come for colleges and universities to be more collectively concerned and share their knowledge about a student’s previous disciplinary history.¹⁸²

Also, transcript notations do not connote that prospective schools must reject those students with a mark. Colleges and universities can chose to ignore the transcript notation and accept the student anyway, just as schools do when hiring employees or accepting students with criminal backgrounds. Again, the purpose of the notations is to ensure that colleges and universities have notice of the incident and can make an independent choice to look into the details of the claim either by contacting the school or the sanctioned student. This notice and communication between schools will serve to better protect the student body and the next possible victim while enforcing a strong punishment and powerful deterrent on the accused. Even though the legislation asks that colleges and universities should err on the side of caution, institutions are by no means forbidden from accepting these incoming students with marked transcripts under the passed bills.

3. Diverse Sanction Standards

A final concern is that there are different disciplinary procedures and sanction standards throughout colleges and universities across the country.¹⁸³ But this concern is also misplaced. The Association of Title IX Administrators (ATIXA), a nonprofit association that offers training with Title IX compliance, insist that the diverse disciplinary standards do not impede on

¹⁸⁰ New, *supra* note 16.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Kingkade, *supra* note 134.

their support for marking transcripts and that sanctions must be determined on a case-by-case basis.¹⁸⁴

In the United States, state-to-state differences exist in the criminal justice system such as crime definitions, and yet, states continue to swap perpetrator's criminal records. The federal government would have too much control implementing a uniform standard of punishments or disciplinary actions to place upon all college students. Responsibility should be left in the hands of colleges and universities. But, part of this concern can be confronted by the federal government enacting even more specific definitions of the qualifying offenses for the transcript notations, or, requiring states to follow their criminal penal codes for definitions of qualifying offenses. This approach would make the transcript notation process more procedurally analogous to the criminal justice system, where criminal record sharing is successful and has been continuing for decades.

CONCLUSION

Title IX entitles students to an education absent of discrimination; campuses rife with sexual violence deprive students of this. The increasing prevalence of rape and sexual assault on college and university campuses has drawn national attention as the President of the United States, politicians and organizations have taken a stance to eliminate student sexual violent on campus and spread awareness. But these strides have not been enough, until now. Virginia and New York have bravely taken initiative in being the first states to adopt laws requiring transcript notations for students found responsible for sexual violent crimes. Marking transcripts in higher education is significant not only because it can decrease the prevalence of sexual violent crimes on college and university campuses and eliminate serial sexual predators, but also it can empower undergraduate female victims to seek and acquire justice. Notating transcripts will help to resolve the lingering and

¹⁸⁴ ATIXA Position Statement in Favor of Expulsion and Suspension on College and University Transcripts, Association of Title IX Administrators, <https://atixa.org/wordpress/wp-content/uploads/2012/01/ATIXA-Position-Statement-on-Transcript-Notation-FINAL.pdf>.

critiqued issues of nonexistent information sharing among educational institutions and lenient sanctions and disciplinary action imposed by authorities under the Title IX.

Improvements to the Title IX adjudication process cannot be made until the remaining 48 states follow in the footsteps of Virginia and New York. Transcript notations cannot provide a strong and effective message to perpetrators as well as victims if only some states chose to adopt this policy. A state-by-state approach is dangerous and inefficient; it is time for an immediate and drastic change. A federal law needs to be adopted mandating educational institutions to mark transcripts of guilty students. By implementing the proposed key factors and federal framework in this Note, student perpetrators will be properly punished for their wrongdoing, recidivistic student perpetrators can be eliminated and educational institutions can be informed of violent records on a national level. The federal legal system must act now and deplete serial rape and sexual assault; nothing can be done for Hannah Graham or Morgan Harrington, but there are thousands of other women in need of saving on college and university campuses.